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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re D.C., et al., Persons Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. D.C., Defendant and Appellant.	F045260 (Super. Ct. Nos. JD100190, JD100191, JD100192) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel, and Mark L. Nations, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Buckley, J., and Levy, J.

D.C. appeals from orders terminating his parental rights (Welf. & Inst. Code, § 366.26) to his three children, who range in age from two to five-years-old.[1] Appellant contends the court erred by: denying his petition for reunification services, finding the children adoptable and not concluding termination would be detrimental to the children due to their relationship with him. On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

In the spring of 2003, appellant lived with his three toddler children who are the subject of this appeal, their mother and two of her school-age children from a previous relationship. Mandated reporters at the older children's school observed those children had visible scars across their bodies and appeared to suffer from parental neglect. Investigation by law enforcement and respondent Kern County Department of Human Services (the department) disclosed that appellant and the mother physically abused not only the two school-age children but also appellant's namesake D.C. who was then four years of age. The adults also neglected all of the children. Further, there was evidence of considerable domestic violence in the home. Authorities consequently arrested appellant and the mother.[2] The department, having detained all five children, initiated dependency proceedings under section 300, subdivisions (a), (b), and (j).

The Kern County Superior Court thereafter adjudged appellant's three children juvenile dependents of the court and removed them from parental custody. Further investigation revealed both parents physically abused and neglected other children of theirs. Because, among other reasons, the parents neither reunified with those children, who had been removed from custody nor subsequently made reasonable efforts to treat

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1 All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 Appellant would remain in custody until September 20, 2003. The discovery of the parents' abuse and domestic violence led to the revocation of appellant's probation for a 2001 felony spousal abuse conviction.

the problems that led to those children's removal (§ 361.5, subd. (b)(10)), the court also formally denied each parent reunification services. It then set a section 366.26 hearing to select and implement permanent plans for the three children who are the subject of this appeal.

The section 366.26 hearing, although originally scheduled for November 2003, did not occur until February 2004. The department claimed it could not locate the mother and required additional time to serve her with notice of the section 366.26 hearing. The mother had moved back to her home state of New Jersey soon after the initiation of these proceedings but did not appear to have a permanent address.

In the interim, appellant petitioned (§ 388) to regain custody of his children or to receive reunification services. He alleged that following his release from custody, he attended and completed parenting classes and was participating in a domestic violence program. The court set appellant's petition for hearing in coordination with the section 366.26 hearing.

At the February 2004 hearing, the department recommended that the court find the children adoptable and terminate parental rights. It submitted the matter on social studies and supplemental social studies filed with the court. Relevant to this appeal, those studies addressed: the ongoing contact between appellant and the children, the substance of appellant's petition for custody or reunification services, and the basis for the department's opinion that the children were adoptable.

On the topic of parent/child contact, the department reported the father had supervised monthly visits with his children while he was incarcerated and supervised weekly visits thereafter. From the outset, D.C., who was the oldest of the three children, knew his father and appeared happy to see him. The younger two children, on the other hand, recognized appellant but had to be coaxed during early visits to have contact with him. Appellant was appropriate and interacted favorably with the children during visits. The children appeared to enjoy themselves although sometimes they were sullen when

they did not get their way. The children showed little to no negative reactions when visits ended. In the estimation of social workers, the benefit of continued contact with their father did not outweigh the permanence the children could achieve through adoption.

As for appellant's petition, the department uncovered that the parenting course and domestic violence counseling in which appellant claimed to be participating were conditions of his felony probation. Also, he originally enrolled in the domestic violence counseling in 2002 but had been twice terminated for noncompliance. He was actually attending the counseling on a sporadic basis when he abused the children and engaged in domestic violence with their mother that triggered these proceedings.

On the issue of adoptability, adoption workers reported as follows. They acknowledged the likelihood of five-year-old D.C.'s adoption was questionable. Although he was described as young, cute, physically healthy, and cognitively average, he had significant behavior problems and suffered from attention deficit hyperactivity disorder (ADHD). D.C. had been in 5 placements since his detention 10 months earlier. Later testimony would reveal the first four placements were very short-termed and he had been in his current foster care placement since June 2003. The early placements failed due to his defiant and destructive behaviors. Since November 2003, when the ADHD diagnosis was made, D.C. had been taking a psycho-stimulant, Concerta. His foster parents subsequently reported a decrease in his behavioral problems and concerns. Those foster parents, however, were not interested in adopting D.C.

The two younger children lived together in foster care since July 2003. Each of them also had multiple placements before going to live in the same placement. The early placements of two-and-one-half-year-old A.C., appellant's middle child, failed due to that child's defiant behavior. Nevertheless, social workers considered the likelihood of his and his one-and-one-half-year-old sister S.C. being adopted as good due to their young

ages and good health. Their caretaker described A.C. as "sweet and adorable" and S.C. as "happy go lucky."

Although social workers originally believed neither child had serious emotional or behavior problems, a psychologist's recent developmental assessment of the two suggested otherwise. The two children's overall, current cognitive functioning was mildly delayed. Due to the children's young ages, however, the testing was not predictive of future development. The psychologist, having read the reports of the social worker and foster mother, also believed each of the younger two children had significant behavioral and emotional problems. Their current foster mother reported the two children knocked over a television, ripped plastic sheets off their beds, screamed for hours, fought with each other, destroyed property, and had difficulty sleeping. According to the psychologist, A.C. was likely anxious, depressed and angry while S.C. was very angry and anxious. Both were developing significant attachment problems. Without help or permanency, each of them could have very insecure attachments.

On the other hand, there were extended family members who lived out-of-state and wished to adopt the children as a sibling group. As a social worker previously reported, "[t]he amazing strength that has arisen in this case is the support of the children's extended family who have been in constant contact with the [department] and have provided a request for placement." Those relatives were a maternal aunt who lived in New Jersey, a paternal aunt from Florida and a paternal great aunt from Florida. Because each of them lived outside of California, it was necessary that Interstate Compact on Placement of Children (ICPC) investigations be conducted. The potential pre-adoptive relatives were aware of all three children's growth, development and special needs.

The maternal relative came forward at the outset of the case and traveled to California to see her nephews and niece. They recognized her and appeared comfortable in her presence. Her ICPC investigation commenced in July 2003 and was almost

complete except for a fingerprint check. However, the maternal aunt recently had surgery and due to her medical problems there was some concern about her ability to care for appellant's children as well as her own.

Appellant had submitted the names of his Florida relatives later in 2003. Their ICPC applications were completed in January and the investigations were pending. Notably, the paternal great aunt had a Florida foster care license and had been a foster parent for the past three years.

In response to the department's evidence, appellant called as a witness the court worker who took the adoption assessments and authored the social studies. Appellant also took the stand on his own behalf.

The court worker testified that defiant behaviors, such as those exhibited by appellant's two young sons, were not uncommon in dependent children. "[A]nxiety goes up, behaviors are going to show." Such behaviors may be based on the type of abuse to which the child was exposed or being moved from one home to another. In D.C.'s case, he was acting out, suggesting he had seen a lot of behavioral problems in his parents' home.

On the issue of the pending ICPC investigations in Florida, the court worker said in his experience the results of the investigations usually come in within six months of the applications. At least one of the Florida relatives had past contact with the children. Also, ICPC required the department to "give all of the information on the behavioral needs, emotional needs, [and] any therapy" related to the children. Further, in the court worker's experience, family members who commit to ICPC investigations usually "don't back out." "[T]hey've been pretty committed in staying with it."

Regarding appellant's petition for reunification services, the court worker testified he had received documentation that on the preceding day appellant had completed his domestic violence counseling. It was the court worker's opinion based on his contact and investigation of this matter that the court should deny appellant's petition. In particular,

the court worker was concerned about the domestic violence counseling especially after appellant's inconsistent participation over the preceding year and a half. Appellant's completion of the counseling program in a short period of two months was a concern as well as the lack of information regarding the substance of the program, the level of appellant's participation, and whether appellant ever admitted to the abuse he inflicted.

Appellant next testified about his life since his release from custody. He was working full-time and had an apartment through the Veterans' Administration. With regard to his domestic-violence counseling program, he admitted he did not openly discuss the physical abuse of his children. When asked what responsibility he took for the physical abuse inflicted on his children, appellant replied "I should have paid more attention to my children." Implying his wife was the sole abuser, appellant claimed at the time he was working long days and when he returned home, his children were asleep. When questioned further, he would only acknowledge that "yes" he inflicted some of the physical injuries. Appellant further testified he had attended other counseling and parenting classes in 2000 and 2001 between other stints of incarceration for domestic violence.

On cross-examination, appellant admitted that if he had not completed the domestic-violence counseling program, he would "[p]robably go back to jail." Also, he pled guilty to willful cruelty to children charges in 2003 when his probation was revoked.

In rebuttal, the department called the adoptions worker, who actually helped prepare the adoption assessments. The worker reaffirmed his opinion that at the present time all three children were adoptable. None of them presented behavioral problems now that would make it difficult for the department to find them an adoptive placement. Also, the availability of three relatives who wished to adopt them was another factor. In the adoptions worker's opinion, the children were also "nice kids. I mean they are adorable, especially the younger two, because they are younger, but they are nice children."

With regard to the paternal great aunt, the adoptions worker explained that a number of paternal relatives had talked amongst themselves and identified her as probably one of the most likely to be able to best meet the children's needs. Indeed the extended family in these children's lives did communicate with one another. "[T]hey all know each other, and they've all communicated to some degree about what's going on here." Further, in the event none of the relatives were approved following the ICPC investigations, the adoptions worker believed he could find another adoptive placement for all three children. He and another permanent placement worker had also looked at additional placements that may be available. However, he expressed his confidence that the ICPCs were going to be approved, especially the paternal great aunt's application. He noted that in addition to her foster care license, she had a home large enough to manage the children.

As to the five-year-old D.C., the adoptions worker expressed his belief that the Concerta medication addressed the child's behavioral issues and those problems had minimized. Based on his current observations, the adoptions worker described D.C. as "fairly calm."

Following counsels' arguments, the court denied appellant's section 388 petition, finding it was not in the children's best interests. The court then terminated parental rights.

DISCUSSION

Section 388 Petition

Appellant claims the court should have granted his section 388 petition and at least ordered reunification services. He contends not only had his circumstances changed since the court denied him services but given the children's lack of a permanent home reunification would be in their best interests. On review of the record, as summarized above, we conclude the juvenile court properly denied the petition.

As appellant's argument acknowledges, a parent may petition the court to modify a prior order on grounds of change of circumstance or new evidence. (§ 388, subd. (a).[3]) The parent, however, must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (b); Cal. Rules of Court, rule 1432(c).) Whether the juvenile court should modify a previously made order rests within its discretion and its determination may not be disturbed unless there has been a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Here, appellant's circumstances had changed in that he was out of custody and he completed previously-ordered domestic violence counseling and a parenting class. In any event, appellant presented no evidence that initiating reunification efforts at this last stage would serve the children's interests in permanency and stability. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) Consequently, we conclude the court did not abuse its discretion by denying appellant's section 388 petition.

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[3] Section 388 provides in pertinent part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. [¶] . . . [¶]

"(c) If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes."

Adoptability

Appellant next challenges the sufficiency of the evidence to support the court's finding that it was likely his children would be adopted. Upon review of the record, we conclude there was no error.

The question of adoptability focuses on the child, e.g., whether his age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. What is required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) However, the case law also recognizes the juvenile court may consider the willingness to adopt expressed by a prospective adoptive parent who has been approved to adopt the minor as evidence the child is likely to be adopted within a reasonable time. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.)

In this case, there was clearly evidence that the children had suffered behavioral and emotional problems, likely due to the abuse and neglect they had witnessed in appellant's home. It was even initially questionable whether the eldest child, D.C. could be adopted. However, medical treatment for his A.D.H.D. had a favorable effect on the child whose problems had minimized. It is also true that by virtue of the inherent delays in completing I.C.P.C. investigations, the department had yet to identify a prospective adoptive parent for the three children. However, the record reveals the children's extended family was aware of the children's circumstances and were nevertheless committed to working together to provide the children with an adoptive home. As previously noted, this sense of family cooperation and commitment was "an amazing strength." It also appeared likely that one or more of the relatives would be approved to adopt.

Despite this showing, appellant criticizes the court's adoptability finding. He appears to contend the evidence was not clear and convincing and thus we should reverse. Although the juvenile court must make its adoptability finding by clear and

convincing evidence (§ 366.26, subd. (c)(1)), the "clear and convincing" standard of proof is not a standard for appellate review (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750). The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine. If there is substantial evidence to support its conclusion, the determination is not open to review on appeal. (*Ibid.*) In other words, the clear and convincing test disappears on appeal and the usual rule of conflicting evidence is applied. (*Sheila S. v. Superior Court* (1995) 84 Cal.App.4th 872, 881.)

Second, appellant urges that the children's behavioral problems were such as to render them unadoptable. His advocacy in this regard is little more than an invitation for this court to reweigh the evidence, something we cannot do. We may not reweigh or express an independent judgment on the evidence. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.) In this regard, issues of fact and credibility are matters for the trial court alone. (*In re Amy M.* (1991) 232 Cal.App.3d 849, 859-860.) All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the decision, if possible. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) According to the department's social studies and the adoptions worker's testimony, the children had several qualities in their favor to support an adoptability finding. We therefore conclude that the court's adoptability findings were supported by substantial evidence. (*In re Brison C., supra,* 81 Cal.App.4th at pp. 1378-1379.)

No Showing of Detriment

Last, appellant contends the court erred by not finding termination would be detrimental to his children's best interests. He claims he was entitled to such a finding based on the evidence of his regular visitation and contact with them (§ 366.26, subd. (c)(1)(A)). We disagree.

Although section 366.26, subdivision (c)(1) acknowledges that termination may be detrimental under specifically designated circumstances, a finding of no detriment is not

a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Thus, when a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is not one of substantial evidence but whether the juvenile court abused its discretion. (*Id.* at p. 1351.) On review of the record, we find no abuse of discretion.

Once reunification services are ordered terminated, the focus shifts to the needs of the children for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) A section 366.26 hearing is designed to protect children's compelling rights to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. (*In re Marilyn H., supra,* 5 Cal.4th at p. 306.) If the child is likely to be adopted, adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

No doubt appellant maintained regular visitation with his children and their visits were pleasant experiences. However, that evidence was insufficient to compel the juvenile court to find that termination would be detrimental to them.

> "The exception in section 366.26, subdivision (c)(1)(A), requires that the parent-child relationship promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A juvenile court must therefore: 'balance[] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*Id*. at p. 575.)" (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1342.)

Here, no such evidence was introduced. To the extent appellant claims his presence would promote stability in light of the fact that the children were not yet in an

adoptive placement, the juvenile court was not compelled to draw that inference and neither will we on review. (*In re Brison C., supra,* 81 Cal.App.4th at pp. 1378-1379.)

We therefore conclude the juvenile court properly exercised its discretion in rejecting appellant's claim.

DISPOSITION

The orders terminating parental rights are affirmed.